THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
JAYCE REID HOFFMAN,
Appellant.

Opinion
No. 20191048-CA
Filed December 23, 2021

Third District Court, Salt Lake Department
The Honorable Kara Pettit
No. 181913065

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JUDGE RYAN M. HARRIS authored this Opinion, in which
JUDGES JILL M. POHLMAN and RYAN D. TENNEY concurred.

HARRIS, Judge:

¶1 Jayce Reid Hoffman placed a cell phone under the bottom of the bathroom door while his girlfriend's fifteen-year-old daughter (Sarah[1]) was in the shower. For this and other acts, Hoffman was charged with voyeurism and attempted sexual exploitation of a minor. After a trial, a jury acquitted Hoffman of voyeurism but convicted him of attempted sexual exploitation of a minor. Hoffman now appeals that conviction, asserting that the trial court erred by denying his motion to suppress video evidence taken from his cell phone, and by denying his motion for directed verdict. We affirm.

1. A pseudonym.

BACKGROUND[2]

¶2 On the morning of December 17, 2018, after her mother (Mother) and older brother (Brother) had left the house to go to work, Sarah—who was fifteen years old at the time—took a shower before school. Upon exiting the shower, Sarah noticed that a cell phone was visible through the space between the floor and the bottom of the bathroom door, placed upside-down and resting against the outside of the door, with its top edge resting on the floor and its camera apparently trained to view into the bathroom from under the door.[3] Sarah wrapped a towel around her and loudly asked, "Is that a camera underneath the door?" Moments later, someone lifted the phone off the ground and Sarah heard footsteps outside the bathroom. After dressing in her bedroom, Sarah was summoned into Mother's room by Hoffman—Mother's boyfriend—who not only admitted that he had placed a cell phone camera underneath the bathroom door, but also told Sarah that he "wanted" her and that he had been experiencing these feelings "for months." He told her that he had "peeked" in her bedroom window before, and he identified scars on her legs that he would not have known about had he not seen her without pants on. He also explained to Sarah that,

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2. "On appeal, we recite the facts from the record in the light most favorable to the jury's verdict and present conflicting evidence only as necessary to understand issues raised on appeal." *Layton City v. Carr*, 2014 UT App 227, ¶ 2 n.2, 336 P.3d 587 (quotation simplified).

3. In their briefing, the parties describe the placement of the cell phone in various ways but, for ease of reference, in the remainder of this opinion we will refer to this placement—just like Sarah did in her initial response to noticing the phone, described in the next textual sentence—as "underneath" the bathroom door.

because of his feelings for her, he had found it necessary to stop looking at pornography involving step-families because "it was tempting for him."

¶3 Hoffman himself acknowledged, in a subsequent interview with the police, that during this conversation he told Sarah that he viewed his "urges" for her as natural and "human" because Sarah was "50 percent [her] mother who [Hoffman] was in love with and attracted to." In that same interview, Hoffman admitted that he had placed a cell phone underneath the bathroom door while Sarah was in the shower, but he maintained that he had not taken any pictures or videos. He explained that he put the phone underneath the door, without activating its camera, to try to overcome his urges and give himself "a pat on the back afterwards" when he resisted the temptation to take photos.

¶4 After their discussion in Mother's room, Hoffman drove Sarah to school, where she began feeling "stressed" and "scared" and subsequently called Brother and asked him to come pick her up. Sarah told Brother what had happened, at which point they returned home and Brother confronted Hoffman and asked him to leave. Brother then called the police.

¶5 When the police arrived, the responding officer (Officer) took written statements from Sarah and Brother. In her statement, Sarah wrote:

> My mother's boyfriend put his phone camera on the bottom of the door and took pictures or a video of me, naked, after the shower[.] After I walked out of the shower, I saw the camera and called it out! He then lifted it and walked off. He talked to me after about it and told me that he had desires to do it for 9 months and that he caught peaks [sic] of me naked and had a lot of chances to do something to me but he had control of it. He explained that he

> couldn't watch pornhub because the popular videos were all about step families[.] He suggested that my mother might've known[.]

In her statement, Sarah did not describe the phone she had seen underneath the door. After obtaining the witness statements, Officer took some photographs and left the scene.

¶6 Later that day, Officer was informed that Hoffman had returned to the house. When Officer arrived on scene, he had an interaction with Hoffman, which was recorded on Officer's body camera. During the interaction, Hoffman stated, in part:

> But I was sitting there, like, head in my hands, like, why . . . am I doing this? What is wrong with me? And I wasn't even paying attention to what was going on. And then I just heard her yell, "Is that a phone?" I was like, oh, oh, hey, stuff's happening. Grabbed the phone and chucked it. But, uh, *it was just on the camera screen*. It wasn't like—there's no pictures taken. There's no nothing.

(Emphasis added.) Officer then took Hoffman into custody and transported him to the police station for further questioning. At the station, officers found a gray LG-brand cell phone (the gray phone[4]) on Hoffman's person, and took possession of that phone.

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4. During these proceedings, the phone seized from Hoffman's person has been variously referred to as "gray," "silver," "black," "black-ish/gray-ish," and the "LG phone." In briefing before this court, Hoffman refers to it as "the gray phone," while the State refers to it as "the silver phone." Having viewed the phone ourselves, we believe the phone is more gray than silver, and will therefore refer to it as such throughout this opinion.

¶7 After being advised of his right to remain silent, Hoffman assented to an interview—the same one already alluded to, *supra* ¶ 3—conducted by a police detective (Detective). During that interview, as noted, Hoffman admitted to placing a phone underneath the bathroom door during Sarah's shower, and offered his reasons for doing so, but denied taking any photos or videos.[5] Hoffman also admitted to having seen Sarah naked on at least one occasion in the past, when she was lying on her bed with the blinds open and he was outside on the balcony smoking, although he claimed it happened accidentally. Near the beginning of the interview, in the context of explaining this earlier incident, and as he was describing the discussion he had with Sarah after she discovered the phone while getting out of the shower, Hoffman indicated—or at least strongly implied—that the phone he placed underneath the bathroom door was the gray phone:

> And I explained a couple of things to [Sarah] before about why I had that urge [to photograph or record her] and about how you know she, without me even trying like, you know, naked stuff of her came up, right? I never was looking for it or

5. Most references herein to Hoffman's interview with Detective are taken verbatim from the trial transcript, which was created from a recording of a recording (that is, from the audio recording of the trial, at which the audio of the interview was played for the jury in court). The original audio recording of the interview is also part of the record, and we have listened to it. For the most part, the interview was correctly transcribed in the trial transcript. At times, however, the trial transcript does not accurately reflect what was said during the interview. The quotes we use in this opinion sometimes include edits we have made to the trial transcript, after listening to the actual audio recording.

> anything. It just—in other situations it happened. You know, I was just trying to explain from those situations that happened, where the urge came from, but I didn't do anything. I didn't take a picture. *You guys have my phone. It's not on it.* There's, you know, no evidence whatsoever of anything.

(Emphasis added.) Hoffman told Detective that the phone he had used that morning was not "even in like photo screen" and "was just sitting there black," a claim that contradicted his statement, made earlier that same day to Officer, that his phone had been "just on the camera screen." Detective asked various follow-up questions, sometimes asking Hoffman to clarify where "your phone" had been placed, and Hoffman responded by describing where he had placed "my phone." Later in the interview, however, Hoffman told Detective that the phone he had placed underneath the bathroom door was not "my phone" but, instead, was "a spare dead" white HTC-brand phone (the white phone) that was "not even charged" at the time.

¶8 On December 18, 2018—the day after the incident and Hoffman's interview—a search warrant for the gray phone was approved, which authorized the police to search that phone for "[d]igital data to include, but not limited to photographs, videos, text messages, and memory SD card(s)." The warrant also stated that this "property and evidence . . . is evidence of the crime or crimes of Sexual Exploitation of a Minor and Voyeurism." In the affidavit supporting the search warrant application, officers did not mention that Hoffman had, later in his interview, identified the white phone as the one he had used. When the police attempted to execute the warrant, however, Hoffman "failed to unlock the phone" and the police were unable to bypass the "security feature" to gain access, so "[n]o data was obtained" that day from the gray phone.

¶9 The next day, December 19, 2018, Detective interviewed Sarah at the Children's Justice Center; the interview began at 3:26 p.m. and lasted approximately forty minutes. In her written statement signed on the day of the incident, Sarah had not described the phone she had seen underneath the bathroom door, and when Detective asked about that during this interview, Sarah described the phone as a white phone, with "a black area on the phone cover where the camera was located." After the interview, Detective and Sarah both went to Sarah's house, where Mother located a white phone and Sarah specifically identified it as the phone she had seen underneath the bathroom door; Sarah and Mother then surrendered possession of the white phone to Detective. At 6:04 p.m., Mother signed a form consenting to a search of the white phone.

¶10 At 4:29 p.m. that same day, while Detective was finishing up his interview with Sarah and making his way over to the house, other officers in Detective's department submitted an application for a second search warrant regarding the gray phone, this time asking for authority to submit the phone to a third party for a "chip off," a procedure that "physically dismantle[s] the phone in order to obtain the digital data stored" on it. In the affidavit supporting the search warrant application, officers again did not mention Hoffman's statement—from the latter part of his earlier interview with Detective—that the phone he claimed to have used was the white phone. And likely because the officers submitting the warrant application did not yet know what Sarah had said during her interview with Detective, officers also did not inform the magistrate that Sarah had identified the white phone as the phone she saw under the bathroom door. A short time later, the second search warrant for the gray phone was approved.

¶11 The next day, on December 20, officers were able to search the contents of both the white phone and the gray phone. In their search of the white phone, officers found no

photographs or videos of any kind, other than factory-generated images. In their search of the gray phone, however, officers found three short video recordings, all made on December 17, that appeared relevant. All three videos appear to have been filmed by placing a phone camera up against a door, and they record what can be seen through the gap between the floor and the door. Two of the videos show Sarah's bedroom, and the other shows Sarah's bathroom. No person is visible in any of the videos. The third video—the one of Sarah's bathroom—appears to have been generated in the exact manner Sarah and Hoffman described; in the video, which lasts about fifteen seconds, one can see a shower curtain as well as a pile of clothes on the bathroom floor, and one can hear the sound of running water as though someone is in the shower. Sarah testified at trial that the clothes visible on the bathroom floor in the third video belong to her, and she inferred therefrom that the video had been recorded while she was in the shower, as her clothes would not have been on the floor unless she was in the shower.

¶12 The State charged Hoffman with voyeurism (a class B misdemeanor, for peeking in Sarah's bedroom window) and attempted sexual exploitation of a minor (a third-degree felony, for attempting to record Sarah while she was in the bathroom). Before trial, Hoffman filed a motion to suppress the three videos found on the gray phone. In this motion, Hoffman asserted that, because the information originally presented to the magistrate had not included Sarah's statement that the phone in question was the white phone, the search warrant affidavits were at least recklessly misleading. The trial court denied the motion.

¶13 Soon after, Hoffman filed a second motion to suppress the three videos. This time, he argued that, even if the search warrant affidavits had not been misleading when they were signed, officers had learned additional material information later (but before the second warrant was executed) when Sarah identified the white phone as the one she saw. Hoffman thus

asserted that the officers should not have proceeded with execution of the second warrant in light of the new information. The trial court denied Hoffman's second motion to suppress, as well as a motion to reconsider the denial of that motion, concluding (among other things) that, even if officers had included the new information in a supplemental affidavit, there still would have been probable cause to search the gray phone.

¶14 The case then proceeded to a two-day jury trial, in which the State introduced into evidence the three videos found on the gray phone. At the conclusion of the State's case, Hoffman asked the court to direct a verdict on the attempted sexual exploitation of a minor charge. In particular, Hoffman argued that, based on the position of the phone, it was impossible for him to have taken photos or video of anything but the "feet, ankles, and the lower portion of anyone's leg," and therefore impossible for him to have captured any image that could qualify as child pornography. In addition, Hoffman asserted that he had not taken a substantial step toward commission of the crime, as required for an attempt charge, because he claimed that he had merely placed the phone underneath the door but had not activated it. The court denied the motion, concluding that the State had met its burden of presenting evidence from which a jury could reasonably convict Hoffman. And at the conclusion of the trial, the jury convicted Hoffman of attempted sexual exploitation of a minor, although it acquitted him on the voyeurism charge.

¶15 A few weeks after the jury's verdict, Hoffman filed a motion for a new trial, again raising the issue of suppression of the three videos found on the gray phone. The court denied the motion, again determining that, even taking the new information from Sarah's interview into account, officers still had probable cause to search the gray phone when they executed the second search warrant. Later, the court sentenced Hoffman to a suspended prison term and forty-eight months' probation.

ISSUES AND STANDARDS OF REVIEW

¶16 Hoffman now appeals his conviction, and asks us to consider two issues. First, he asserts that the trial court erred when it denied his motion for directed verdict, which was premised on the claim that the evidence presented at trial was insufficient to support his conviction. "We review a trial court's ruling on a motion for directed verdict for correctness." *State v. Carrick*, 2020 UT App 18, ¶ 22, 458 P.3d 1167 (quotation simplified). "In reviewing the denial of a motion for a directed verdict based on a claim of insufficiency of the evidence, we will uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *Id.* (quotation simplified).

¶17 Second, Hoffman asserts that the trial court erred when it denied his motion to suppress the three videos taken from the gray phone. On appeal, Hoffman advances two different legal theories in support of suppression. First, he asserts that the search warrant affidavits were overbroad and lacked particularity. Second, he asserts that whatever probable cause officers might have had upon obtaining the search warrants had dissipated by the time they executed the second warrant, given the new information officers obtained from Sarah's interview. As we explain below, *see infra* Part II.A, only the second of these legal theories was raised before the trial court; the first is therefore unpreserved. With regard to the unpreserved legal theory, Hoffman invites us to apply plain error review. "To demonstrate plain error, a defendant must establish that (i) an error exists; (ii) the error should have been obvious to the [trial] court; and (iii) the error is harmful." *State v. Hedgcock*, 2019 UT App 93, ¶ 11, 443 P.3d 1288 (quotation simplified). With regard to the preserved legal theory, we review the trial court's decision to deny the motion to suppress "as a mixed question of law and

fact," reviewing the court's factual findings for clear error and its legal conclusions "for correctness, including its application of law to the facts of the case." *State v. Fuller*, 2014 UT 29, ¶ 17, 332 P.3d 937.

ANALYSIS

I

¶18 Hoffman challenges the trial court's denial of his motion for directed verdict, claiming that the evidence presented at trial was insufficient to support his conviction for attempted sexual exploitation of a minor. In support of this challenge, Hoffman makes two arguments. First, he asserts that he did not take a "substantial step" toward commission of the charged crime, as required by the attempt statute. Second, he asserts that, due to the position of the phone, it was impossible for him to have captured any images that would qualify as child pornography. We address Hoffman's two arguments in turn.

A

¶19 A person commits the crime of sexual exploitation of a minor when that person "knowingly produces, possesses, or possesses with intent to distribute child pornography." Utah Code Ann. § 76-5b-201(1)(a)(i) (LexisNexis Supp. 2021). And a person is guilty of "an attempt to commit a crime" when that person "intends to commit the crime" and "engages in conduct constituting a substantial step toward commission of the crime." *Id.* § 76-4-101(1)(a), (1)(b)(i) (2017). Thus, to obtain a conviction on the charge of attempted sexual exploitation of a minor, the State had to prove beyond a reasonable doubt that Hoffman intended to "produce[] or possess[] . . . child pornography," *see id.* § 76-4-101(1)(b)(i); *see also id.* §§ 76-1-503(2), 76-5b-201(1)(a)(i), and that Hoffman "engage[d] in conduct constituting a

substantial step" toward commission of that crime, *see id.* § 76-4-101(1)(a).

¶20 Our legislature has explained that "conduct constitutes a substantial step if it strongly corroborates the actor's mental state." *See id.* § 76-4-101(2). Our supreme court, interpreting this statute, has explained that a substantial step requires "significant conduct" in the form of an "overt act." *See State v. Arave*, 2011 UT 84, ¶ 30, 268 P.3d 163 (quotation simplified). That act must be "something more than mere preparation"; it must be "a tangible step toward commission of a crime that transcends intent, yet fails to culminate in its planned accomplishment." *Id.* (quotation simplified).

¶21 Hoffman told both Sarah and the police that he had "urges" to see Sarah naked, and that he had placed a phone underneath the bathroom door while Sarah was in the bathroom, but he denied that he had actually taken any photos or videos. However, the State presented evidence to the contrary; indeed, the evidence recovered from the gray phone indicated that, on December 17, Hoffman had actually taken a fifteen-second video of whatever could be seen from underneath the door while Sarah was in the shower.[6] Thus, while the State certainly presented

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6. We necessarily include the evidence found on the gray phone as part of our analysis in evaluating the denial of Hoffman's motion for a directed verdict. As we explain, *infra* Part II, the trial court did not err in denying Hoffman's motion to suppress the videos found on the gray phone, and therefore the jury properly considered them. But in any event, the propriety of directed verdict rulings must be evaluated on the basis of the evidence actually presented, including even evidence that is later, on appeal, determined to have been inappropriately admitted. *See Franklin v. Stevenson*, 1999 UT 61, ¶ 7, 987 P.2d 22 (stating that a motion for a directed verdict "does not raise (continued…)

evidence of Hoffman's intent, it also presented much more than that. In this case, the State presented evidence that Hoffman took concrete actions to effectuate that intent: he surreptitiously made his way to the bathroom door while Sarah was in the bathroom, placed at least one phone—and perhaps two, at different times[7]—underneath the door, and hit "record" on at least one

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(…continued)
questions relating to the competency or admissibility of evidence," and that, in considering such a motion, "the evidence must be taken as it existed at the close of the trial," and that therefore "all evidence submitted to the jury must be considered by the court in ruling on a motion for [a directed verdict]" (quotation simplified)); *see also Arreguin-Leon v. Hadco Constr. LLC*, 2018 UT App 225, ¶ 29, 438 P.3d 25 ("In considering [a motion for a directed verdict], we view the evidence as it existed at the close of evidence, without determining whether it was properly admitted."), *aff'd*, 2020 UT 59, 472 P.3d 927. Accordingly, it is appropriate to consider the evidence found on the gray phone in evaluating the soundness of the trial court's denial of Hoffman's motion for a directed verdict.

7. One can reasonably infer, from the video found on the gray phone, that Hoffman placed the gray phone underneath the bathroom door on December 17 while Sarah was in the shower, and that he hit the "record" button on that phone in an effort to capture images of the interior of the bathroom. And one can reasonably infer, from both Hoffman's interview and Sarah's testimony, that the white phone was underneath the bathroom door at the moment when Sarah emerged from the shower, even if Hoffman did not record any images with it. *See State v. Nielsen*, 2014 UT 10, ¶ 49, 326 P.3d 645 ("[W]e must view th[e] evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." (quotation simplified)).

phone in an effort to capture video of the interior of the bathroom.

¶22 In our view, these actions easily qualify as a "substantial step" toward the commission of the relevant crime. These actions are significant, and constitute more than mere intent or even preparation. Indeed, by placing the phone underneath the door and hitting the "record" button, Hoffman had done everything he needed to do to commit the crime; at that point, it was only a question of whether Sarah was going to exit the shower and position herself in a way that would have resulted in the capture of images that would qualify as child pornography. Thus, Hoffman's actions clearly indicate an intent to commit the crime of sexual exploitation of a minor and constituted a "tangible step toward commission" of that crime. *See Arave*, 2011 UT 84, ¶ 30.

B

¶23 Hoffman also argues that the trial court erred in denying his motion for directed verdict because creating child pornography was an impossibility under the circumstances as he believed them to be. *See* Utah Code Ann. § 76-4-101(3)(b) (LexisNexis 2017) ("A defense to the offense of attempt does not arise . . . due to factual or legal impossibility if the offense could have been committed if the attendant circumstances had been as the actor believed them to be."). Specifically, Hoffman argues that, due to the position of the phone, "the camera could only capture pictures under the door of [Sarah's] feet and ankles and maybe part of her calves," and that any pictures or videos taken would thus not have qualified as child pornography. This argument fails for two reasons.

¶24 First, while we acknowledge Hoffman's point that the camera angle limited the phone's field of view, it was quite possible for Sarah to have entered the frame of the video, had she emerged from the shower while the camera was recording,

and it would certainly have been possible for her to have performed some action (e.g., bending over to towel off, or crouching down to pick up her clothes on the floor) that would have resulted in Hoffman's camera capturing images of her breasts, buttocks, or genitalia. In this case, given the other evidence of Hoffman's intent, such images could have qualified as child pornography. *See id.* § 76-5b-103(1)(b), (8), (10)(f) (defining "[c]hild pornography" as "any visual depiction . . . of a minor engaging in sexually explicit conduct"; defining "[s]exually explicit conduct" as "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person"; and defining "[n]udity or partial nudity" as "any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered").

¶25 Second, it was for the jury to determine Hoffman's state of mind based on the evidence presented, including whether the circumstances of the situation, as Hoffman "believed them to be," would have rendered the creation of child pornography impossible. *See id.* § 76-4-101(3)(b). A reasonable jury could have determined that Hoffman anticipated that Sarah, when emerging from the shower, could position herself in a way that would facilitate the capture of nudity or partial nudity.

¶26 Thus, the State presented sufficient evidence from which a reasonable jury could find, beyond a reasonable doubt, that Hoffman took substantial steps toward commission of the charged crime, and that the commission of the crime was not an impossibility under the circumstances as Hoffman believed them to be. In this situation, the trial court did not err by denying Hoffman's motion for a directed verdict.

II

¶27 Hoffman next challenges the trial court's denial of his motion to suppress the videos found on the gray phone and, in

support of that challenge, raises two independent legal theories. First, he argues that the court should have granted his motion to suppress because the warrants authorizing the search of the gray phone were "overbroad" and "lacked particularity." Second, Hoffman asserts that any probable cause that may have initially supported the issuance of the warrants had dissipated by the time the second warrant was executed. We address each of Hoffman's theories, in turn.

A

¶28 Hoffman first argues that the search warrants for the gray phone were unconstitutional because they were overbroad and lacked particularity. But Hoffman did not preserve this legal theory for appellate review: although Hoffman filed several motions to suppress, he did not advance this particular theory in connection with any of them. *See Donovan v. Sutton*, 2021 UT 58, ¶¶ 20–23, 498 P.3d 382 (noting that parties "advancing a new legal theory" must preserve that theory in the trial court, and concluding that a party who had opposed a motion on several grounds, but not the one in question, had not preserved that theory for appellate review). In his first motion to suppress, Hoffman asserted that the search warrant affidavits were misleading, but he did not argue that they were overbroad or lacking particularity. And in his second and successive motions, Hoffman asserted that, even if the search warrant affidavits were not misleading when they were signed, the officers learned additional material information later (but before the second warrant was executed) when Sarah identified the white phone as the one used in the incident. But at no point did he assert that the warrants were overbroad or lacking particularity. Thus, Hoffman did not present this legal theory to the trial court in a way that gave the court an opportunity to rule on it. *See State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 ("An issue is preserved for appeal when it has been presented to the [trial] court in such

a way that the court has an opportunity to rule on it." (quotation simplified)). It is therefore unpreserved.

¶29 Nevertheless, Hoffman asks us to review this issue for plain error, an exception to the preservation requirement. *See id.* ¶ 19 (describing plain error as one of the "three distinct exceptions to preservation"). "To demonstrate plain error, a defendant must establish that (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful. If any one of these requirements is not met, plain error is not established." *Id.* ¶ 20 (quotation simplified). "For an error to be obvious[,] the law governing the error must be clear or plainly settled at the time the alleged error was made." *State v. Hedgcock*, 2019 UT App 93, ¶ 15, 443 P.3d 1288 (quotation simplified). Additionally, for an error to be harmful, it "must be shown to have been of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the defendant" if the alleged error had not occurred. *See Johnson*, 2017 UT 76, ¶ 21 (quotation simplified). Hoffman cannot meet this standard, because the trial court committed no obvious harmful error.

¶30 The United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "In order to accurately describe the 'things to be seized,' a warrant must achieve two objectives: first, it must supply adequate information to guide officers in selecting what items to seize; and second, the category of items specified in the warrant cannot be too broad so that it includes articles that should not be seized." *State v. Fuller*, 2014 UT 29, ¶ 37, 332 P.3d 937 (quotation simplified). How particular a specific warrant must be, however, "necessarily depends on the circumstances and the nature of the activity under investigation." *Id.* (quotation simplified).

¶31 Our supreme court has warned that, with the advent of technological innovation, including the ubiquity of smartphones, "law enforcement must be increasingly cautious with respect to the particularity requirement because access to a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs." *Id.* ¶ 38 (quotation simplified). "Judges must be careful in drafting the scope of the warrant, especially in determining whether the device is considered contraband, and thus subject to seizure, or whether only particular *information* on the device is properly subject to seizure." *Id.* (quotation simplified). Nevertheless, when a warrant authorizes a search "for child pornography, the computers or other devices used to store child pornography may be considered contraband or an instrumentality of the crime," and "thorough searches of multiple devices may be required . . . since criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity." *Id.* ¶ 39 (quotation simplified).

¶32 In the present case, the search warrants for the gray phone authorized the officers to search the phone for "[d]igital data to include, but not limited to photographs, videos, text messages, and memory SD card(s)." This language, standing alone, might be cause for concern regarding overbreadth, because it arguably allows a search of anything contained on the entire phone. But the warrants also made clear that they were authorizing a search for "evidence of the crime or crimes of Sexual Exploitation of a Minor and Voyeurism"; this language could arguably be construed to limit the warrants' scope to authorizing only a search of those items on the phone that might contain child pornography. And as noted, when child pornography is at issue, the terms of the search of computers or other electronic devices are necessarily quite broad and require "thorough searches" because purveyors of child pornography might mislabel files to cloak their contents or hide them to avoid discovery. *See id.* In this situation, we do not view the terms of

these search warrants as being so obviously overbroad as to trigger an obligation on the part of the trial court to intervene, without being asked, to address the issue.

¶33 We therefore conclude that the trial court did not plainly err by not intervening, sua sponte, to declare the search warrants invalid on grounds of overbreadth and lack of particularity. On this basis, we reject Hoffman's first suppression argument.

B

¶34 Next, Hoffman argues that, even if the search warrants for the gray phone were supported by probable cause at the time they were approved, any such probable cause had dissipated by the time the second warrant was executed. Hoffman asserts that new information received by the police—specifically, Sarah's identification of the white phone, not the gray phone, as the one that Hoffman had placed underneath the door—after the issuance of the second search warrant but before its execution operated to erase any probable cause the police might have had earlier, and he asserts that, under such circumstances, the second warrant's execution was unlawful. Hoffman is correct that new information acquired after issuance but before execution of a search warrant can—in theory—operate to dissipate probable cause, but in this case the new information did not have that effect. That is, we conclude that, even after taking the new information into account, officers still had probable cause to believe that incriminating evidence would be found on the gray phone, and therefore the execution of the second warrant was proper.

¶35 As noted above, the United States Constitution mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. For a search warrant to be valid, it must be based on probable cause. *See United States v. Ventresca*, 380 U.S. 102, 107 (1965). But probable cause is not a particularly high standard: it "exists

when there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quotation simplified); *see also Kaley v. United States*, 571 U.S. 320, 338 (2014) (stating that the probable cause standard "is not a high bar"). "The information necessary to show probable cause must be contained within a written affidavit given under oath" and submitted to a neutral magistrate who ultimately determines whether probable cause exists. *State v. Fuller*, 2014 UT 29, ¶ 22, 332 P.3d 937 (quotation simplified); *see also State v. Gonzalez*, 2021 UT App 83, ¶ 22, 494 P.3d 1066.

¶36 Probable cause must of course exist at the time the warrant is issued, but in order for the search to be valid, it must also continue to exist "from the issuance of a search warrant to its execution." *United States v. Garcia*, 707 F.3d 1190, 1195–96 (10th Cir. 2013); *see also Grubbs*, 547 U.S. at 95 n.2 ("[P]robable cause may cease to exist after a warrant is issued. The police may learn, for instance, that contraband is no longer located at the place to be searched." (citing *United States v. Bowling*, 900 F.2d 926, 932 (6th Cir. 1990))); *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005) ("If probable cause is established at any early stage of the investigation, it may be dissipated if the investigating officer later learns additional information that decreases the likelihood that the defendant has engaged, or is engaging, in criminal activity."); *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988) ("As a corollary, moreover, of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." (quotation simplified)). If probable cause is no longer present when the warrant is executed, the search is improper, even if probable cause existed when the warrant was issued.

¶37 Hoffman's first motion to suppress asserted that the affidavits submitted by officers in support of their request for a

search warrant were misleading at the time they were submitted, because they did not inform the magistrate that Sarah had stated that the phone she saw was the white phone. In support of that motion, Hoffman relied on *Franks v. Delaware*, 438 U.S. 154 (1978). In that case, the United States Supreme Court noted that "when the Fourth Amendment demands a factual showing sufficient to comprise probable cause, the obvious assumption is that there will be a truthful showing." *Id.* at 164–65 (quotation simplified). The Court held that, in cases where an officer made a deliberately or recklessly false statement in a search warrant affidavit, and that false statement materially affected the magistrate's determination of probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156. In this case, the trial court denied Hoffman's *Franks* motion because it was unable to find that officers had made a deliberately or recklessly false statement in the search warrant affidavits. On appeal, Hoffman makes no *Franks* claim: that is, he does not challenge the court's denial of his first motion to suppress, and does not assert that the affidavits submitted in support of any of the search warrant requests were false or misleading when made. Indeed, he acknowledges that the new information to which he points—that Sarah told officers that the phone she had seen was the white phone—was obtained late in the afternoon of December 19, and most likely after the application for the second search warrant had already been submitted.

¶38 Instead, Hoffman advances the argument he made in his second and successive motions to suppress: that any probable cause officers might have had, at the time the second search warrant was approved, had dissipated by the time that warrant was executed. As noted above, Hoffman correctly understands the law: probable cause must exist not only at the time the warrant is authorized, but also at the time the warrant is executed. *See Garcia*, 707 F.3d at 1194 ("[A] warrant remains

valid only as long as the information in the oath or affirmation supporting its issuance provides probable cause to believe the items sought will still be found in the place to be searched at the time the search is conducted.").

¶39 There are at least two different factors that can cause a search warrant, valid upon its issuance, to lose its validity by the time it is executed: the passage of time itself, and new information received in the interim. *See United States v. Dalton*, 918 F.3d 1117, 1127 (10th Cir. 2019). "There is a plethora of cases in nearly every [jurisdiction] explaining the circumstances in which a time delay will nullify probable cause as found in the warrant." *Id.*; *see also Fuller*, 2014 UT 29, ¶ 33 (discussing the potential staleness of information contained in search warrant affidavits). But "there are far fewer examples of cases where new information, rather than the passage of time, nullifies the probable cause articulated in a warrant." *Dalton*, 918 F.3d at 1127. We are aware of no such cases issued by Utah appellate courts.

¶40 In our view, two of the comparatively rare federal cases discussing this issue are most illustrative. In *United States v. Marin-Buitrago*, 734 F.2d 889 (2d Cir. 1984), the court acknowledged that officers have an obligation to return to the magistrate "when a definite and material change has occurred in the facts underlying the magistrate's determination of probable cause," but emphasized that "the duty to report new or correcting information to the magistrate does not arise unless the information is material to the magistrate's determination of probable cause." *Id.* at 894 (quotation simplified). In assessing the materiality of the omitted information, the appellate court "assume[d] the role of the issuing magistrate" and evaluated "whether the affidavit still support[ed] a finding of probable cause after the inclusion of" the new information. *Id.* at 895. In that case, the court concluded that the newly acquired information was not material, because even if it had been

included in the affidavit, that affidavit "clearly establish[ed], by a fair probability," that incriminating evidence would be found at the location to be searched. *Id.* at 896.

¶41 And in the second case, *United States v. Bowling*, 900 F.2d 926 (6th Cir. 1990), officers suspected that the defendants had been engaged in illegal drug activity and, after some officers left the scene to obtain a warrant to search the defendants' trailer, other officers obtained consent to conduct a "preliminary search" of the trailer. *Id.* at 928–29. That search revealed no incriminating evidence. *Id.* at 929. Some time later, the other officers returned, warrant in hand, and conducted a second search pursuant to the warrant, and this time they found incriminating evidence. *Id.* The defendants later moved to suppress the evidence discovered in the second search, arguing that information obtained in the first search and not shared with the magistrate—that the trailer apparently did not contain incriminating evidence—served to dissipate any probable cause that had originally supported the search warrant at the time of its issuance. *Id.* at 930–31. The court denied the motion, and the appellate court affirmed. *Id.* at 935.

¶42 The *Bowling* court acknowledged the applicable legal rule that later-acquired information can serve to dissipate the probable cause that originally supported a search warrant, stating that "where an initial fruitless consent search dissipates the probable cause that justified a warrant, new indicia of probable cause must exist to repeat a search of the same premises pursuant to the warrant." *Id.* at 932. However, the court declined to suppress the evidence found in the trailer because it determined that—even taking the new information into account—probable cause still existed. *Id.* at 933–34. Notably, the court stated that "the fruits of the second search are not to be suppressed if *this court* finds that a neutral magistrate would have determined that probable cause existed to conduct a second search despite [the] prior fruitless consent search." *Id.* at 933

(emphasis added). Ultimately, although the court chided the officers for not returning to the magistrate for a reassessment of probable cause after the preliminary search, *see id.* (indicating that the officers "should have refrained" from executing the search warrant until the magistrate determined that probable cause "continued to exist"), the court "declin[ed] to suppress the second search's fruits" because, in its view, "probable cause for a second search" still existed at the time of the warrant's execution, even taking into account the new information gained in the preliminary search, *see id.* at 934.

¶43 In our view, these cases, read together, indicate that suppression of evidence discovered in the execution of a search warrant is required when new information comes to light after issuance of that warrant, but before its execution, that serves to dissipate the probable cause that once existed to support the warrant. *See Dalton*, 918 F.3d at 1128 (stating that "probable cause becomes stale when new information received by the police nullifies information critical to the earlier probable cause determination before the warrant is executed"). Whether new information was significant enough to result in the dissipation of probable cause is a question that may be taken up by a reviewing court, often in the context of adjudicating a motion to suppress. *See Bowling*, 900 F.2d at 933; *Marin-Buitrago*, 734 F.2d at 895 (stating that the reviewing court is to "assume the role of the issuing magistrate" and determine "whether the affidavit still supports a finding of probable cause after the inclusion of" the new information); *cf. Franks v. Delaware*, 438 U.S. 154, 171–72 (1978) ("[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.").

¶44 The touchstone of the reviewing court's inquiry is whether the new information would have been *material* to the probable cause determination—that is, whether probable cause

still existed to support the warrant at the time of its execution, even taking the new information into account. *See Marin-Buitrago*, 734 F.2d at 894–95 (explaining that "[t]he duty to report new or correcting information to the magistrate does not arise unless the information is material to the magistrate's determination of probable cause," and that "[f]acts omitted from a warrant affidavit are not material unless they cast doubt on the existence of probable cause," and holding that "the addition of the new information" in that case was not material because it "would not affect the finding of probable cause"); *see also State v. Schulz*, 55 A.3d 933, 940 (N.H. 2012) (stating that "officers must discontinue a search under the authority of a warrant when an unambiguous and material change has occurred in the facts, eliminating probable cause"); *cf. In re Guardianship of A.T.I.G.*, 2012 UT 88, ¶ 35, 293 P.3d 276 (stating that "a fact is material only if it is 'significant or essential to the issue or matter at hand'" (quoting Black's Law Dictionary 670 (9th ed. 2009))).

¶45 A corollary to these principles is that officers do not need to return to the magistrate for a reassessment of probable cause unless there has been a *material* change in the facts that serves to dissipate probable cause. *See Marin-Buitrago*, 734 F.2d at 895 ("The duty to report new or correcting information to the magistrate does not arise unless the information is material to the magistrate's determination of probable cause."). In our view, this arrangement makes sense; search warrants are often issued in dynamic situations, in which facts can and often do change between issuance of a warrant and execution of that warrant, but in which many of the changed facts may turn out to be minor or inconsequential. It makes little sense—and would strain both law enforcement and judicial resources—to put in place a policy that requires officers to return to the magistrate for a reassessment of probable cause every time there is *any* change in the underlying factual situation.

¶46 But if officers deem the new information immaterial, and therefore decide not to return to the magistrate for a reassessment of probable cause prior to execution of the warrant, they run the risk that a reviewing court might later disagree with their assessment, conclude that the new information was material after all, and suppress the evidence discovered upon execution of the warrant. Given these realities, officers would be wise—especially in cases not involving exigent circumstances—to return to the magistrate for a reassessment of probable cause anytime a new piece of information might make a difference to the probable cause calculus. In our current electronic age, officers can obtain the input of a magistrate relatively quickly. *See State v. Roberts*, 2018 UT App 92, ¶ 12 n.4, 427 P.3d 416 (noting that, in Utah, "[j]udges take turns acting as the 'on-call' magistrate for the purpose of electronically reviewing search warrant applications," and often review such applications "immediately upon receipt"). Officers who gamble in these situations run the risk that evidence discovered during a search will later be suppressed by a reviewing court. Indeed, we endorse the admonition given by the New Hampshire Supreme Court in a similar situation:

> To the extent that the police have encountered new information that casts doubt upon the ongoing justification for the search, they would be well-advised to refrain from continuing the search until a neutral magistrate determines that probable cause continues to exist. Should they fail to do so, the remedy of suppression will be warranted if a reviewing court finds that the magistrate would not have issued the warrant had the magistrate known about the new information.

Schulz, 55 A.3d at 940; *see also Bowling*, 900 F.2d at 933 (offering the court's view that, "[b]ecause no exigent circumstances [were] presented by the facts of this case, the officers should have

refrained from the second search until a neutral magistrate determined that probable cause continued to exist").

¶47 We acknowledge that the State, during oral argument before this court, conceded that officers had a duty in this case to return to the magistrate for a probable cause reassessment before executing the second warrant. But this concession was made in the context of urging us to adopt a two-part framework that assumed a meaningful difference between *relevance* and *materiality*: (1) that officers have an obligation to return to the magistrate upon learning any information that is potentially *relevant* to the probable cause determination; but (2) officers' failure to do so will be considered harmless if the new information was not *material*, that is, if a reviewing court later determines that probable cause nevertheless existed, under the totality of the circumstances, at the time of the execution of the warrant. Thus, the State conceded only that the new information—Sarah's statement about the white phone—was *relevant* enough to trigger reassessment under its proposed test; the State did not concede that the new information was *material*, as that term is used in the cited federal cases, or that officers would have had any duty to return to the magistrate if materiality (as opposed to relevance) were the test. We appreciate the State's limited concession, and agree (as noted above) that best police practice is for officers to return to the magistrate in any situation in which there exists reasonable doubt regarding a new fact's materiality.

¶48 But we decline to adopt the State's suggested two-part framework, for two reasons. First, we do not think it is supported by a comprehensive reading of the federal cases discussed above. *See, e.g.*, *Marin-Buitrago*, 734 F.2d at 895 ("The duty to report new or correcting information to the magistrate does not arise unless the information is material to the magistrate's determination of probable cause."). And second, the State's proposed analytical framework is arguably inconsistent

with our supreme court's decision in *Brierley v. Layton City*, 2016 UT 46, 390 P.3d 269. In that case, although officers were in the process of obtaining a warrant at the time they conducted their search, they had not yet obtained one. *Id.* ¶ 12. Had the warrant application been timely submitted, it would likely have been granted, because officers had facts at their disposal that would have amounted to probable cause. *Id.* ¶¶ 4–12, 28. When the defendant later moved to suppress the evidence discovered in the search, prosecutors defended the officers' actions by asserting that the evidence would have inevitably been discovered because the warrant was in process and would almost certainly have been granted. *Id.* ¶ 13. The district court granted the motion to suppress, a ruling our supreme court found to be correct. *Id.* ¶ 41. In the supreme court's view, the prosecution's argument amounted simply to an assertion that "[i]f [officers] hadn't done it wrong, [they] would have done it right." *Id.* ¶ 26 (quoting *State v. Topanotes*, 2003 UT 30, ¶ 19, 76 P.3d 1159). Because the officers were obligated to seek the magistrate's input regarding probable cause, they could not evade that requirement simply by asserting that probable cause existed in any event. *Id.* ¶¶ 26, 35; *see also Bowling*, 900 F.2d at 933 (noting that the United States Supreme Court has "emphatically cautioned that in the absence of urgent circumstances officers should not rely on their own discretion, but should instead resort to a neutral magistrate, to determine whether probable cause to conduct a search exists").

¶49 Under these precedents, once it is determined that officers have a duty to seek the magistrate's input regarding the probable cause question, officers generally must do so, and their failure to discharge that duty will not be excused merely because, at the time of their warrantless search, they happened to have undisclosed facts at their disposal that would have amounted to probable cause. Thus, if we were to determine that the officers had a duty, in this case, to return to the magistrate for a reassessment of probable cause, and failed to do so, we do

not believe that we could—consistent with *Brierley*—excuse the officers' failure to discharge that duty based upon a type of harmless error analysis. If they had a duty to return to the magistrate, they should have done so, and we cannot countenance the argument that "officers 'would have done it right' if they 'hadn't done it wrong.'" *See Brierley*, 2016 UT 46, ¶ 35 (quoting *Topanotes*, 2003 UT 30, ¶ 19). Accordingly, we do not view the State's proposed framework as consistent with applicable case law.

¶50 In the present case, however, officers had already gone to the magistrate once, and not even Hoffman asserts, on appeal, that probable cause was lacking at the time the warrant issued. In this important way, the situation here differs from *Brierley*. And in this situation, the officers' duty to return to the magistrate is triggered only if the facts discovered after issuance of the warrant, but before its execution, are significant enough to have dissipated the probable cause that existed at the time of the warrant's issuance. *See Marin-Buitrago*, 734 F.2d at 895.

¶51 Applying these principles to the facts of this case, we must act as the reviewing court and assess whether, under the totality of the circumstances as they existed at the time the search warrant was executed, probable cause continued to exist in light of the new information officers obtained in Sarah's interview. *See Schulz*, 55 A.3d at 940 (stating that the reviewing court's analysis "necessarily involves consideration of new facts acquired" after the original issuance of the warrant "both insofar as they are *inconsistent* with probable cause as well as to the extent that there are reasonable alternative explanations that confirm the original grounds of the warrant"). In this case, the State asserts that, even considering the new information, probable cause still existed to search the gray phone for videos or photos of Sarah in the bathroom. Put differently, the State posits that, if officers had returned to the magistrate for a

reassessment, and explained the entire situation, the magistrate would have reissued the warrant. We agree with the State.

¶52 Hoffman correctly points out that, had the officers returned to the magistrate, they would have had to inform the magistrate that Sarah had identified the white phone—and not the gray phone—as the one she saw underneath the bathroom door on December 17. But had the officers returned to the magistrate, they would also have informed the magistrate of other evidence—some of which was likewise not included in the original search warrant affidavits—indicating that Hoffman had used the gray phone. For instance, Hoffman admitted that he had placed at least one phone underneath the bathroom door on the morning in question, and the gray phone was the one discovered on Hoffman's person at the time of his arrest, just hours after the incident. And during the first part of his police interview, Hoffman stated—or at least strongly implied—that he had placed the gray phone underneath the bathroom door during the incident in question; he stated that he had used "my phone," that "you guys have my phone" (referring to the gray phone), and that officers could verify that he had not actually taken a picture with that phone by checking the phone they had in their possession. Of course, Hoffman contradicted this statement further on in the interview when he claimed that he had used the white phone, rather than the gray phone, but his claims in this regard—in particular, that the white phone he had used was "not even charged"—were belied by his statement, made earlier that same day to Officer, that the phone he had used had been "on the camera screen" when he placed it underneath the door.

¶53 As noted, the probable cause standard "is not a high bar." *See Kaley v. United States*, 571 U.S. 320, 338 (2014). Probable cause is present "when there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quotation simplified). If

officers had returned to the magistrate and fully explained the situation, we are confident that the magistrate would have determined that there existed a fair probability that videos or photos of Sarah in the bathroom would be located on the gray phone, and that the magistrate would have reauthorized the warrant on that basis.

¶54 Accordingly, the new information obtained by officers after issuance of the second search warrant—that Sarah had identified the white phone as the one she saw underneath the bathroom door—was not material to the probable cause determination, because it did not serve to dissipate the probable cause supporting the warrant. Even taking that information (along with other evidence, under a totality of the circumstances analysis) into account, there still existed a fair probability that child pornography would be found on the gray phone. For these reasons, the officers were not obligated to return to the magistrate for reassessment, and the trial court did not err in denying Hoffman's second and renewed motions to suppress the videos discovered on the gray phone.

CONCLUSION

¶55 The trial court did not err when it denied Hoffman's motion for directed verdict because the State presented sufficient evidence from which a reasonable jury could find, beyond a reasonable doubt, that Hoffman took substantial steps toward commission of the charged crime, and that commission of the crime was not an impossibility under the circumstances as Hoffman believed them to be. The court did not commit plain error by failing to intervene, sua sponte, to declare the search warrant overbroad or lacking in particularity. And it did not err by denying Hoffman's motions to suppress, because probable cause sufficient to support the warrant continued to exist even at execution. Accordingly, we affirm Hoffman's conviction.